



**Court Findings of Prosecutorial Misconduct Claims in
Post-Conviction Appeals and Civil Suits
Among the First 255 DNA Exoneration Cases**

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Executive Summary

Prosecutorial misconduct remains a largely underdeveloped research issue in large part because of the challenges of defining what constitutes misconduct, but also because some misconduct never comes to light. For example, it is impossible to know the extent to which prosecutors engage in misconduct, especially if it involves suppressing potentially exculpatory evidence that never gets disclosed at trial.

DNA exoneration cases offer a unique perspective on this issue, given that we know the clients in these cases were convicted of crimes they did not commit. As such, while courts differentiate between harmless and harmful error, we know now that what was deemed as harmless error in these appeals may have contributed to the wrongful convictions.

Results from this study indicate that of the 65 DNA exoneration cases involving documented appeals and/or civil suits addressing prosecutorial misconduct, 31 (48%) resulted in court findings of error, with 18% of findings leading to reversals (harmful error). It is difficult to place these court error rates in perspective—first, because these rates are based solely on documented appeals, providing an incomplete picture of the total number of appeals in these cases and their outcomes.

Second, these cases are unrepresentative of the larger offender population, making up those who were mainly convicted in the 1980s, for violent crimes, sentenced to long prison terms, and dispersed throughout the nation. While a few studies have looked at outcomes in appeals alleging prosecutorial misconduct, most have been limited to specific regions or to a subset of conviction types¹.

While not a perfect comparison, there has been one large, nationwide study, by the Center of Public Integrity on prosecutorial misconduct which found that among all 11,452 documented appeals alleging some type of prosecutorial misconduct between 1970 and 2002, 2,012 appeals led to reversals or remanded indictments, indicating harmful error—a rate of 17.6%. This is nearly identical to the rate of harmful error findings in the DNA exoneration cases of 18%. This may suggest that innocent persons raising claims of misconduct on appeal are not much more likely to find relief than presumed guilty persons raising similar claims—a suggestion that raises questions about the ability of the appellate process to correct wrongful convictions². In fact, an earlier study of the first 200 DNA exonerees found that reversal rates for the DNA exoneree cases were the same when compared to a matched sample of criminal cases with similar characteristics, where innocence had not been established³.

¹ James Liebman, Jeffrey Fagan, and Valerie West, *A Broken System: Errors in Capital Causes 1973-1995* (2000) (reviewed 5,760 capital cases nationwide to examine prejudicial error, including prosecutorial misconduct); Kathleen Ridolfi, *California commission on the Fair Administration of Justice: Prosecutorial Misconduct: a System Review* (2007) (reviewed all appeals alleging PMC in California between 1996 and 2007 and reported the court findings and any subsequent prosecutorial disciplining.); Ken Armstrong and Maurice Possley, *Trial & Error: How Prosecutors Sacrifice Justice to Win (Parts 1-5)*, Chicago Tribune (1999) (reviewed court record and appeals across the country between 1963 and 1999 to determine how many homicide convictions were overturned because of prosecutorial misconduct); Sophie Brill, *Prosecution and Defense Attorney Accountability Project: End of Year Report* (2008) (reviewing appeals involving Brady and Rosario claims from 1998 to 2007 in various NY, TX, AZ, FL, ID, LA, and MA counties).

² For more on this subject, see Keith Findley, *Innocence Projection in the Appellate Process*, Marquette Law Review (2009).

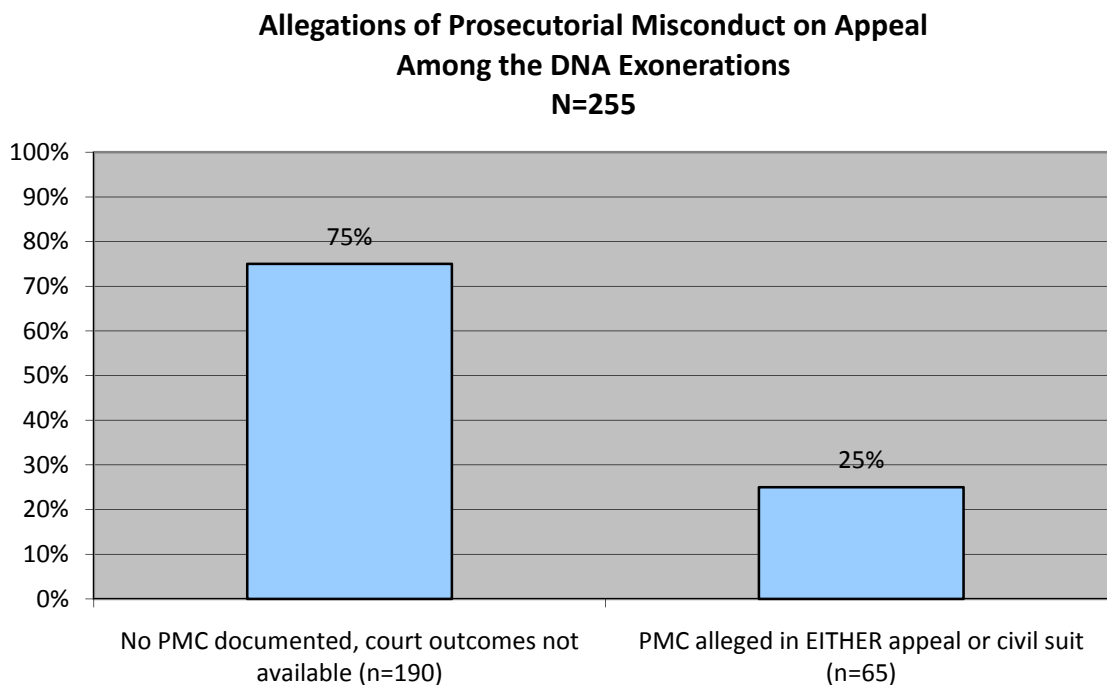
³ Brandon Garrett, *Judging Innocence*, 108 Columbia Law Review, 107 (2008).

Methodology

In order to locate appeals involving prosecutorial misconduct claims, WestLaw was accessed to conduct searches using specific search terms such as prosecutorial misconduct, Brady, Batson and improper argument. Additionally, searches were done using client name to find any cases involving civil suits with claims of prosecutorial misconduct. Several additional cases were uncovered when examining a study done by the Center for Public Integrity on prosecutorial misconduct.

Claims of Misconduct

Based on the sources described above, the figure below presents the percentage of cases involving allegations of prosecutorial misconduct, where court findings were available. One-quarter (65/255) of DNA exoneration cases involved documented appeals and/or civil suits alleging prosecutorial misconduct⁴. Most of these allegations were brought up on appeal, however, three cases involved civil suits⁵.

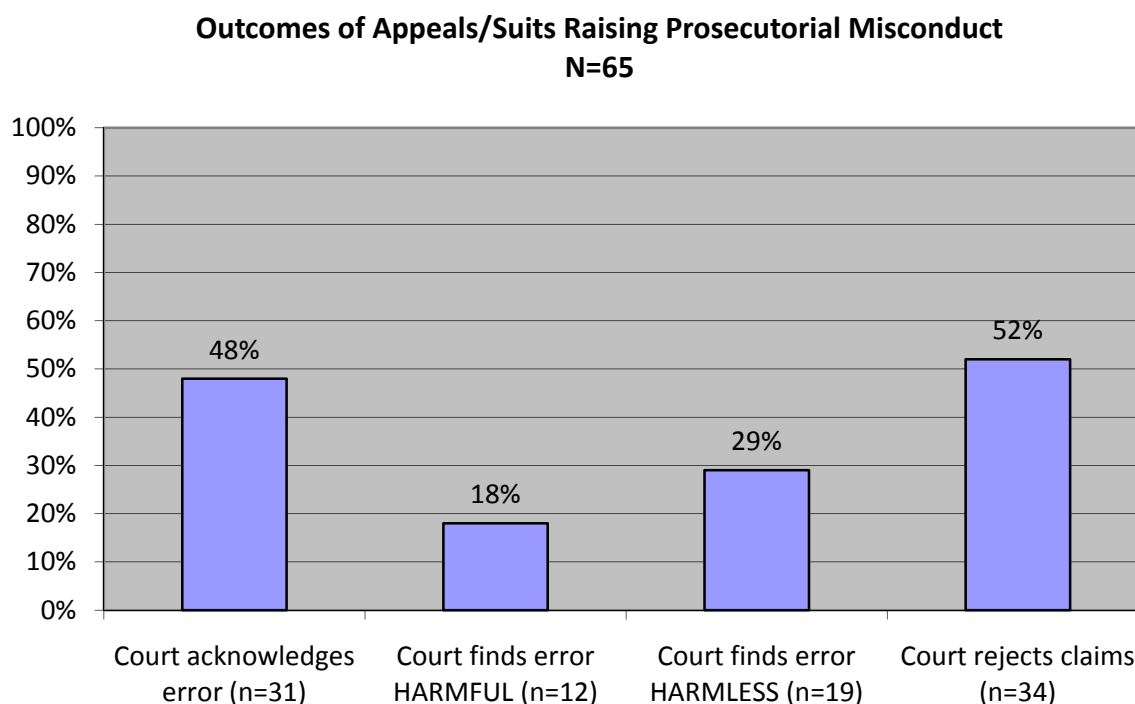


⁴ Three of these 65 cases involved multiple defendants. Therefore the number of exonerees involved in these appeals/civil suits is 68.

⁵ There were 13 additional civil suits involving prosecutorial misconduct where court outcomes were not available – either the suits were allowed to continue or there was a settlement prior to a court finding. These cases are not counted here, since no court decision is available. However, all but three of these 13 cases also involved an appeal with claims of prosecutorial misconduct, so the results of those appeals are presented.

Outcomes of Appeals/Suits Raising Prosecutorial Misconduct

Overall, about half (48%)⁶ of appeals and suits alleging prosecutorial misconduct resulted in court findings of error (harmless or harmful)—such findings include both intentional and negligent acts of the prosecutors. When looking at outcomes separately for harmless and harmful findings, 18% of appeals/suits resulted in findings of harmful error—leading to convictions being reversed⁷. Nearly one-third (29%) of appeals/suits resulted in court findings of harmless error—the court acknowledged that the prosecutor made an error, but that the error was not enough to have changed the outcome of the original trial. In the other cases (52%), courts dismissed the claims either by rejecting the misconduct claim(s) outright or waiving/not responding to the claim(s).



⁶ These 31 cases where error was acknowledged by the courts involved 34 exonerees (3 cases involved 2 defendants in each).

⁷ Court findings of harmful error led to the following: new trial received and exoneree was reconvicted (n=4); prosecutor dropped charges before new trial – usually after DNA tests confirmed innocence (n=6); higher court reinstated conviction after lower court reversed (n=1); acquitted at retrial which included DNA evidence excluding exoneree (n=1).

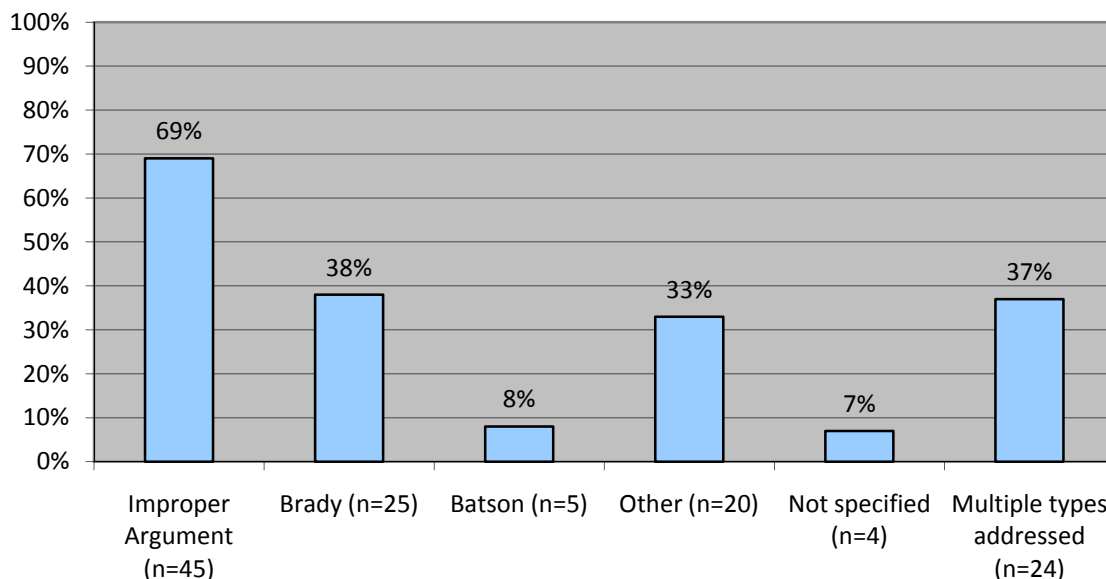
Specific Types of Misconduct: Allegations and Court Findings

Allegations. Just over two-thirds of appeal and civil suit cases involved claims of prosecutorial misconduct relating to improper arguments and questioning by the prosecutor during the trial. Examples of such arguments included making questionable/mistaken inferences regarding forensic evidence introduced at trial and making inflammatory/improper remarks in closing arguments such as “you should have seen the evidence we kept out.”

More than one-third (38%) of misconduct allegations involved Brady violations by the prosecutors – withholding potentially exculpatory evidence such as knowledge of alternative suspects and forensic science evidence that may have weakened the prosecution’s case. Eight percent of cases involved Batson claims—alleging that the prosecutor used a peremptory challenge to dismiss a juror, based solely on his/her race. Other less frequently recorded misconduct allegations were included in an ‘other’ category. Some of these issues included claims of eliciting perjured testimony, malicious prosecution, destruction of evidence, fabrication of evidence, and improper use of jailhouse snitches.

Over one-third (37%) of these misconduct cases involved multiple claims of prosecutorial misconduct—most frequently a combination of a Brady violation and an improper argument/questioning claim.

Types of Alleged Misconduct
N=65



Court Findings. When examining court findings specific to these various types of allegations, 56% of improper argument claims and 28% of Brady violation claims resulted in court findings of error (harmless or harmful). While the overall error rate (including both harmful and harmless error) for improper arguments was nearly twice that of Brady violations, the harmful error rate was actually greatest for Brady violation allegations—approximately one-quarter of Brady violation allegations resulted in overturned convictions, compared to nine percent of improper argument allegations. Therefore, when courts confirmed Brady violations, they were more likely to deem the misconduct harmful, leading to reversals, than when considering improper arguments, which were more likely to be considered harmless error.

Interestingly, all five of the Batson violation allegations were rejected by the courts, while one of the three perjury allegations resulted in a reversal. Here, the prosecutor allowed the perjured testimony of the state's key witness to stand uncorrected – she stated that she received no deal from the prosecutor for testifying against the defendant, which was false. Three of the 17 other, less frequently reported types of misconduct, revealed court findings of error. These cases involved a prosecutor's belligerent behavior toward court, defense counsel and witnesses (harmless); destruction of evidence (harmless); and state's refusal to test DNA before trial when defendant could not afford to on own (harmful).

Court Decisions of Error by Types of Allegations

Type of Allegation	Number of appeals/suits addressing each claim	Court finding of error (harmless or harmful)	Harmful error – overturned conviction
Improper Argument	45	25 (56%)	4 (9%)
Brady Violation	25	7 (28%)	6 (24%)
Batson	5	0	0
Perjury	3	1 of 3 cases	1 of 3 cases
Other	17	3 (18%)	1 (6%)

Appendix

A. Review of 12 cases where appellate courts found harmful error by prosecutors

Bloodsworth, Kirk, MD:

- **1986 appeal: The suppression of exculpatory evidence (Brady Violation)**
 - Failure to disclose detective's report on an alternate suspect. The detective's report concluded "...that Mr. Gray has a great deal more information than he [is] releasing to us at this time, and as a result of this I feel that he should not be overlooked as a possible suspect in the above offense."
 - Court's reasoning (first trial). "At that time the State informed the court that the prosecution had never had a copy of the confidential report... Of course, the fact that the prosecutors were not in physical possession of the report is immaterial... All factors considered we conclude that the undisclosed report is sufficient to undermine confidence in the outcome of the trial. Hence, there must be a new trial, " Bloodsworth v. State, 512 A.2d 1056, 1060-1.
 - Bloodsworth received a new trial and was reconvicted to two life sentences. He remained in prison until DNA evidence ultimately exonerated him in 1993.

Brison, Dale, PA:

- **1992 appeal: Right to a fair trial denied by failure to conduct DNA testing.**
 - Court's reasoning: "In view of the wide acceptance and admissibility of DNA test results and the ability of such testing to accurately and definitively inculcate or exclude an individual as the perpetrator of the crime, we agree with appellant that DNA tests should have been performed on the samples taken from the victim in this case. ... Had tests been conducted and found to exculpate or exclude appellant as the perpetrator, admission of the test results and the other evidence may well have provided sufficient reasonable doubt to secure an acquittal. In the alternative, inculpatory results would certainly have strengthened the Commonwealth's case by providing concrete corroboration of the victim's identification. Under these circumstances, principles of justice require us to vacate appellant's conviction and remand to the trial court for the performance of DNA analysis on the samples taken from the victim," Commonwealth v. Brison, 618 A.2d 420, 425.
 - DNA evidence subsequently exonerated Brison in 1994.

Cruz, Roland, IL:

- **1994 appeal: Questioning by prosecutors that elicits inadmissible testimony**
 - Improper introduction of hearsay evidence used to impeach the State's own witness; compounding this error by referring to it as substantive evidence in closing arguments.
 - Court's reasoning: "The record shows that the prosecutor repeatedly referred the jury to the substance of Rodriguez's alleged statements to Wilkosz. The prosecutor also requested the jury to consider whether Rodriguez or Wilkosz was telling the truth. Additionally, the prosecutor repeatedly mischaracterized

the impeachment evidence as if it indicated that the mail-request incident occurred around the time of the murder. ... If there was any doubt before, this conduct conclusively establishes that Rodriguez's prior inconsistent statements were introduced solely for the purpose of placing inadmissible hearsay before the jury," *People v. Cruz*, 643 N.E.2d 636, 660.

- DNA evidence subsequently excluded Cruz but the state retried him anyway. He was acquitted at this trial in 1995. [Note, this was his third trial – the first was overturned because of another prosecutorial misconduct issue, but he was reconvicted. This second trial led to the appeal described above.]

Good, Donald Wayne, TX:

o 1986 appeal: Making inflammatory remarks

- o Prosecutor commented on defendant's attitude and character as evidence of guilt.
 - Court's reasoning: "Prosecutor focused upon the demeanor appellant exhibited during the complainant's testimony and his own, characterizing it as 'cold, unnerved, uncaring.' In both instances, the prosecutor argued that appellant's demeanor inferred his guilt. We fail to see how such an argument falls within any of the acceptable categories of jury argument," *Good v. State*, 723 S.W.2d 734, 736.
 - Good received a new trial and was reconvicted. He remained in prison until DNA evidence ultimately exonerated him in 2004.

Jean, Lesley, NC:

o 1991 appeal: The suppression of exculpatory evidence (Brady violation)

- o Prosecutor failed to disclose evidence regarding the hypnosis of two key witnesses, including the victim.
 - Court's reasoning: "Jean contends that the evidence concerning the hypnosis is material evidence under *Brady*. We agree. ...Jean's conviction rests substantially on the witness identifications, which makes disclosure of the recordings all the more critical. Had defense counsel had the audio recording and accompanying reports, it could have used that evidence to discredit the testimony of Ms. Wilson and Officer Shingleton. ... We are persuaded that the audio recordings and accompanying reports-twice requested-should have been disclosed to defense counsel, and that the government's failure to do so was a violation of the principles announced in *Brady* and its progeny. Accordingly, the judgment of the district court is reversed and the case remanded with instructions to issue the writ of habeas corpus," *Jean v. Rice*, 945 F.2d 82, 87.
 - Jean was released from prison after this reversal in 1991, but it was not until 2001 that he was officially exonerated based on DNA testing that was performed in 2000.

Jimerson, Verneal, IL

- **1995 appeal: Offering false, inadmissible, or misleading evidence**
 - The State allowed perjured testimony of its witness to stand uncorrected. Specifically, the defendant asserts that the State's primary witness, Paula Gray, was allowed to testify falsely at the defendant's trial that she had not been promised anything in exchange for her testimony against the defendant.
 - Court's reasoning: "The defendant argues that the State was required to correct this perjured testimony and that the failure to do so requires that the defendant be granted a new trial. We find that a new trial is warranted on this ground," People v. Jimerson, 652 N.E.2d 278, 283.
 - DNA evidence subsequently exonerated Jimerson in 1996.

Krone, Ray, AZ:

- **1995 appeal: The suppression of exculpatory evidence (Brady violation)**
 - Prosecutor did not turn over videotape by state dental expert, who relied centrally on this tape, until the day before trial began.
 - Court's reasoning: "Krone requested relief at the earliest possible moment. He asked for a continuance or preclusion of the videotape. The jury had not yet been selected. The State had just disclosed a tape that its star witness would rely upon almost exclusively. A continuance would either have caused a problem or it would not. If not, then it would have given the defense an opportunity to meet the force of the new exhibit. If a delay would have caused hardship, then the tape should have been precluded. The State could have used the static exhibits, which it claims were not unlike the tape. Under these facts, the sanctions that would have cured the harm were precisely those the defendant suggested. The action taken to tell the defendant to examine the tape between the start of trial and the day it was shown was not adequate. ... The State's discovery violation related to critical evidence in the case against the accused. We cannot say it did not affect the verdict. We reverse the convictions and remand for a new trial, where Krone will have an opportunity to meet the force of the videotape," State v. Krone, 897 P.2d 621, 624-5.
 - Krone received a new trial and was reconvicted. He remained in prison until DNA evidence ultimately exonerated him in 2002.

Linscott, Steven, IL:

- **1987 appeal: Misstating the evidence**
 - Prosecutor 'made up' evidence/misstated evidence in his summary of what the forensic expert said on the stand.
 - Court's reasoning: "No one testified that...the seminal material 'came from a non-secretor.' The prosecutor simply made-up that piece of 'evidence.' ...there is no testimony anywhere in the record that any of the hairs that were found and the defendant's hairs matched or were identical. As a matter of fact, as previously shown here, the prosecutor's expert witness plainly refused such a suggestion... ...the prosecutor also told the jury that there was evidence that the defendant's pubic hairs and the pubic hairs that were combed from the victim

matched and were identical... the prosecutor's message to the jury was not only a distortion of Tahir's testimony, but also a distortion of the meaning of the evidence," *People v. Linscott*, 511 N.E.2d 1303, 1306-8.

- DNA evidence subsequently exonerated Linscott in 1992 (Linscott was released on bond in 1985 after a previous reversal for another reason. A higher court reinstated the conviction, but he remained on bail while appeals continued. Prosecutors eventually decided to do further DNA testing before retrying Linscott and the results excluded him).

McCarty, Curtis, OK:

- **1988 appeal: Discovery violation, improper argument/evidence, making inflammatory remarks**
 - o Prosecutor failed to send forensic evidence to defense in a timely fashion. Additionally, the prosecutor improperly commented on facts not in evidence, stated his personal opinion, disparaged defense counsel, and made inflammatory remarks.
 - Court's reasoning: "Ironically, the State not only used the tardiness of its disclosure to deny a defense expert a fair and adequate opportunity to conduct a competent independent examination, but also took advantage of its own tardiness to discredit whatever examination was made by the defense expert. ... It is highly improper for a prosecutor to comment on facts not in evidence. ... It is improper for a prosecutor to express his personal opinion of the guilt of an accused. ... Mr. [XXX] improperly attacked the credibility of defense counsel by accusing him of 'making up a story.' ...the comment could only have been calculated to inflame the passions and prejudices of the jury. ... In any event, we are compelled to conclude that the combined effect of the improper prosecutorial comments 'was so prejudicial as to adversely affect the fundamental fairness and impartiality of the proceedings.' ... This Court will not stand idly by 'wring[ing] its hands' expressing nothing more than 'a ritualistic verbal spanking' and an 'attitude of helpless piety' in denouncing the deplorable conduct of prosecutors such as we have found in this case. ... The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall ... As was so aptly stated by Judge Bussey under similar circumstances, 'the appellant's right to a fair trial was the victim of an overzealous prosecutor. The record is replete with error committed during both stages of the trial, which when considered in a cumulative fashion, necessitates that the conviction be reversed and remanded for a new trial.'" *McCarty v. State*, 765 P.2d 1215, 1217-22.
- McCarty received a new trial and was reconvicted (by the same prosecutor that the appellate court found to have engaged in multiple acts of misconduct during the first trial). He remained in prison until DNA evidence ultimately exonerated McCarty in 2007.

Turner, Keith, TX:

- **1985 appeal: Asking questions or making comments that impair a defendant's exercise of his constitutional right to remain silent after being given Miranda rights**
 - Prosecutor commented on defendant's silence post-arrest: continually questioned defendant while on the stand about whether he protested his innocence and raised alibi after arrest.
 - Court's reasoning: "Both the United States Supreme Court and the Texas Court of Criminal Appeals have made it clear that a prosecutor's questions as to a defendant's post-arrest silence violate the defendant's constitutional rights," Turner v. State, 690 S.W.2d 66, 68.
 - State appealed and higher court reversed lower court's decision. Turner remained in prison until DNA evidence ultimately exonerated him in 2005.

Watkins, Jerry, IN:

- **2000 appeal: The suppression of exculpatory evidence (Brady violation)**
 - Prosecutor withheld several key pieces of evidence from the defense including: a) that an undisclosed witness saw Peggy Sue being abducted at a time for which Watkins has a solid alibi, and by a person who could not have been Watkins; (b) that another suspect in the case failed a polygraph test; and (c) that investigators received reports of other men who had known Peggy Sue and who either told others they had killed her or turned up with blood on their clothes the night she disappeared.
 - Court's reasoning: "First, with the exception of the 1987 Ackeret motion, all the Brady claims involve exculpatory or impeaching information that plainly should have been turned over to the defense, especially in response to the defense's pointed requests. The state has offered no excuse for these violations, which are so numerous and complete as to have been systematic," Watkins v. Miller, 92 F.Supp.2d 824, 856.
 - Subsequent DNA testing exonerated Watkins in 2000.

Williamson, Ron, OK:

- **1995 appeal: The suppression of exculpatory evidence (Brady violation)**
 - Prosecutor failed to disclose the existence of a videotape in which the defendant made exculpatory statements.
 - Court's reasoning: "Defense counsel was not provided a 1983 videotape of exculpatory statements made by Petitioner following a polygraph examination administered by an OSBI agent. ... This court finds and the respondent admits that the 1983 videotape is exculpatory. Since the record reflects it was not provided to Petitioner's counsel until after trial, it goes without comment that Petitioner has met his burden of establishing: (1) the prosecution suppressed evidence; and (2) the evidence suppressed was favorable to the accused. ... After reviewing the 1983 videotape, this court finds that if it had been provided to defense counsel, he would have been prompted to develop a sentencing phase strategy which would have at least dulled the sting of the prosecution's blistering, uncharged misconduct aggravation testimony leading to Petitioner's

receiving the death penalty. Thus, the court finds denial of the tape affected the jury's determination on both the conviction and penalty phases of the trial," Williamson v. Reynolds, 904 F.Supp. 1529, 1562-5.

- Williamson remained in the prison psychiatric hospital while the State appealed this 1995 decision and lost in 1997. In preparation for retrial, DNA testing was performed which excluded Williamson (and his co-defendant Fritz) and he was exonerated in 1999.

B. Review of 3 examples of cases where appellate courts acknowledged error but deemed it HARMLESS.

Booker, Donte, OH:

- **1988 appeal: Improper arguments**
 - o Improper statements, making statements not based on the evidence
 - Court's reasoning. "Booker cites the prosecutor's statement to the jury that 'He took the stand and gave you nothing but lies, sheer lies ...' (Tr. 450). We note the defendant admitted numerous lies to the police following his arrest. ...the prosecutor's comment was directed to Booker's trial testimony and thus was arguably improper. However, in light of the substantial evidence of Booker's guilt, we hold any misconduct in this regard was harmless beyond a reasonable doubt," State v. Booker, 1988 WL 86417.

Evans, Michael (co-defendant Paul Terry), IL:

- **1979 appeal: Improper arguments**
 - o Making misleading remarks, making comments that suggest the existence of unused evidence
 - Court's reasoning. "Defendant Evans contends he was denied his right to a fair trial when the prosecutor during closing argument suggested to the jury that Evans had a prior criminal background when in fact there was no evidence that Evans had been convicted or even arrested for any prior criminal offense. ... The prosecutor's statement here, not based on the evidence, and suggesting that there may have been something in defendant Evans's past which would indicate that he was the type of person to commit the crime with which he was charged was improper...[but] we are unable to say that the verdict would have been otherwise had the prosecutor's remarks not been made. ...[both] defendants argue that by telling the jury that they should have seen all the evidence the state kept out of the case, the jury was allowed to speculate on what the other evidence would have been and could have construed the comment as meaning that the prosecutor knew of evidence that could not be presented to the jury but showed the defendants' guilt. ... While such a comment is not to be condoned, it was not of such magnitude as to require reversal. Moreover, the objection to the statement was immediately sustained, thus minimizing any prejudice that may have resulted, and the jury was instructed to disregard any statements by counsel not based upon the evidence," People v. Evans and Terry, 399 N.E.2d 1333, 1341-4.

Yarris, Nicholas, PA:

- **1988 appeal: Improper arguments**

- Improper statements during closing arguments

- Court's reasoning. "...appellant argues that the following statement was improper because it was not supported by evidence of record: '[A]nd then he [appellant] comes into the Bellevue-Stratford where she [his former girlfriend] is working and says 'I should kill you.' Now was he love sick? And you heard his mother say how his personality changed.' Appellant correctly contends that there is no evidence of record that he told his girlfriend, 'I should kill you.' ... Although defense counsel objected to the prosecutor's statement and reminded the court of a sidebar ruling that testimony of threats made against appellant's former girlfriend would not come into evidence, the court overruled the objection, apparently having forgotten the earlier ruling. The following day, however, the court corrected its error and instructed the jury... Since there is no indication that the prosecutor's error was other than inadvertent, since the remark was supported in substance by other evidence of record, although it was an improper summary of testimony, and since the court correctly instructed the jury that the prosecutor's summary of evidence was incorrect, we do not view the prosecutor's error as requiring a new trial," Commonwealth v. Yarris, 549 A.2d 513, 525-6.